BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaints by Mike Naraine dated May 24, 1985 and October 24, 1985, alleging discrimination in employment on the basis of race, colour, place of origin and ethnic origin by Ford Motor Company of Canada Ltd., Gord Batstone, George Gojtan, Andy Barr, W.H. Dobson, Bob Daragon and Mike Tighe.

B E T W E E N :

Ontario Human Rights Commission

- and -

Mike Naraine

Complainant

- and -

Ford Motor Company of Canada Ltd.,
Gord Batstone, George Gojtan, Andy Barr, W.H. Dobson,
Bob Daragon and Mike Tighe

Respondents

DECISION ON COSTS

Adjudicator : Professor Constance Backhouse

Date : March 11, 1997

Board File No: 93-0035

Decision No : 97-005-C

Board of Inquiry (*Human Rights Code*)
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Ontario Human Rights Commission	)	Mark Hart
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Mike Naraine, Complainant	)	Fiona Campbell
	)	Michael McFadden
	)	Cheryl Gaster
	)	Karen Andrews (Agent)
Ford Motor Company of Canada Ltd., Corporate Respondent	)	Steven Jovanovic
	)	Lisa Kozma
	)	Russell Juriansz
	)	Anne Irwin
Gord Batstone, George Gojtan, Andy Barr, W.H. Dobson, Bob Daragon and Mike Tighe, Personal Respondents	)	Steven Jovanovic
	)	Lisa Kozma
	)	Russell Juriansz
	)	Anne Irwin

DECISION RE COSTS

Earlier decisions related to this complaint have assessed liability for violations of the *Human Rights Code*, R.S.O. 1990, c.H.19, and provided remedial relief to the complainant, Mike Naraine, for discrimination with respect to employment because of his race, colour, place of origin and ethnic origin. (See Decision No. 96-023 dated 25 July 1996; Decision No. 96-043-D dated 9 December 1996.) This Board of Inquiry held that Mr. Naraine was subjected to racial harassment in his working environment at Ford. The Board also concluded that Ford's decision to discipline and discharge Mr. Naraine was discriminatory. The corporate Respondent was found liable for violations of both s.4(1) and 4(2) [now s.5(1) and 5(2)] of the *Code*.

Certain aspects of the complaints against the Respondents, specifically Mr. Naraine's claims that he had been discriminated against with respect to job training and job assignments, were dismissed. The reason for the dismissal was the extraordinary length of time it took the Commission to bring this complaint before a Board of Inquiry, which resulted in the loss of the documentary evidence necessary to permit a fair adjudication of the claims. For reasons set out in the decision, all claims against the individual employees named in Mr. Naraine's complaints were also dismissed.

The remedial order pursuant to these findings directed the corporate Respondent to reinstate Mr. Naraine, to reimburse him for specified lost wages and benefits, and to provide appropriate re-training and employee assistance counselling. Ford was also ordered to pay $20,000 in general damages, $10,000 for mental anguish, and interest on the sums owing to Mr. Naraine.

The Respondents requested that this Board retain jurisdiction to consider an application for costs prior to the completion of the hearing. This decision relates to the Respondents' application for costs to be assessed against the Ontario Human Rights Commission.

I. The Law Regarding the Assessment of Costs Against the Commission

In ordinary civil litigation, costs generally follow the event. Professor Peter Cumming, as he then was, outlined the general rules that courts have developed for costs in civil litigation in *Persaud* v. *Consumers Distributing Ltd. (No. 2)* (1993), 19 C.H.R.R. D/491 at D/493:

> Canadian civil procedure has opted for a general rule of indemnity. It allows for those costs, reasonably incurred throughout the litigation of the dispute, to be recovered by the successful party provided that his/her conduct was appropriate throughout the procedure. (G. Watson, W. Bogart, A. Hutchinson and R. Sharpe, *Canadian Civil Procedure, 3d ed.* (Toronto: Emond Montgomery Publications, Limited, 1988) at 264-65.)

The rules for costs arising out of Ontario Board of Inquiry proceedings under the *Human Rights Code* are quite different. A Board of Inquiry's authority to award costs is set out in s.41(4) of the *Code*, which provides:

> Where, upon dismissing a complaint, the board of inquiry finds that,
>
> > a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
> >
> > b) in the particular circumstances undue hardship was caused to the person complained against,
>
> the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

The jurisdiction to award costs is statutory, not inherent, as noted in *Karumanchiri* v. *Liquor Control Board of Ontario* (1988), 9 C.H.R.R. D/4868 (Ont. Div. Ct.). The decision to award costs is discretionary, not mandatory; (see *Pham* v. *Beach Industries Ltd.* (1987), 8 C.H.R.R. D/4008 at D/4023; *Johnson* v. *East York Board of Education et al.* (1991), 17 C.H.R.R. D/175 at D/187; *Ouimette* v. *Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19 at D/34; *Adams* v. *Bata Retail* (1989), 10 C.H.R.R. D/5954 at D/5962; *Pattison* v. *Fort Frances (Town) Commissioners of Police* (1987), 8 C.H.R.R. D/3884 at D/3900; *Persaud (supra)* at D/493.) The burden of proof lies with the

respondent to prove on a balance of probabilities that the case falls squarely within the requirements of s.41(4); (see *Jerome* v. *DeMarco* (unreported, 21 May 1993, Ont. Bd. Inq.).)

These s.41(4) rules under the *Code*, as Professor Cumming noted in *Persaud* at D/493, are "different from provisions in other provincial and federal human rights legislation." With the exception of Manitoba, where the legislation provides that costs may be ordered if one of the parties makes a complaint or reply that is "frivolous or vexatious," or "prolongs the adjudication" through conduct that is frivolous or vexatious, most Canadian jurisdictions permit broad discretion in the awarding of costs for human rights proceedings. Professor Cumming describes the situation at D/493:

> Of those [provisions in other provincial and federal human rights legislation] that account for the issue of cost allocation at all, most provide very general provisions, allowing for substantial discretion in the hands of the board of inquiry. The federal, Newfoundland, Alberta, British Columbia, Saskatchewan and Quebec legislation all permit a board of inquiry to make any order that it considers appropriate. There is no distinction made between allocations to the complainant and to the respondent. There is also no outline of specific circumstances deserving of such an order. A board of inquiry, under these provisions, may therefore order costs to be awarded in whatever instances it believes are deserving.

The Ontario legislation is clearly the most restrictive in the country with respect to costs in human rights proceedings. The reasons that underlie the legislative decision to fetter a tribunal's discretion to award costs are unclear. Professor Cumming noted in *Persaud* at D/493 that "Hansard, which outlines Legislative Assembly debates, provides no discourse with respect to s.40(6) [now s.41(4)] and its intended function." In earlier stages of litigation under the *Code*, parties did not typically request costs, and adjudicators did not grant them. The currently numbered s.41(4) seems to have been introduced to permit an award of costs in exceptional cases. As Professor Gorsky noted in *Wellington* v. *City of Brampton et al.* (unreported decision, 13 December 1995, Ont. Bd.

Inq.), the section seems to be intended to permit an award of costs "in circumstances that appear to trouble the legislature." Professor Cumming speculated that the reason that costs are only awarded to respondents, and not to complainants, is that the complainant's costs are "borne by the public as the Commission, a government agency, has carriage of the case"; (*Persaud, supra* at D/493.) Professor Gorsky suggests in *Wellington* at p.79 that it would have been "simpler and more illuminating" if the legislature had provided "explicit guidelines as is done in the enunciation of general principles relating to the exercise of discretion under s. 131 of the *Courts of Justice Act* to award costs as set out in s.57.01 (1) of the Rules of Practice."

At least one decision of the Ontario Board of Inquiry has attempted to award costs outside of the specified parameters of s.41(4). Professor Daniel Baum awarded costs against the respondent and in favour of the complainants in *Karumanchiri, (supra)*, after finding that the Liquor Control Board of Ontario had discriminated on the basis of race. In doing so, Professor Baum relied upon the broad remedial authority found under s.40(1) of the *Code* to "make restitution including monetary compensation." The Ontario Divisional Court overturned this award in *Karumanchiri* v. *Liquor Control Board of Ontario* (1988), 9 C.H.R.R. D/4868, stating as follows:

> There is no inherent jurisdiction in a court, nor in any other statutory body, to award costs. The Board of Inquiry is created by the Ontario *Human Rights Code, 1981,* S.O. 1981, c.53. As a statutory body it can only have jurisdiction to award costs if such jurisdiction is expressly given to it either by the *Code* or some other *Act.* The legislature has expressly provided for the recovery of costs in limited circumstances "to the person complained against" under section 40(6) [now s.41(4)] of the Ontario *Human Rights Code*.... The power of the Board of Inquiry under section 40(1) to "make restitution including monetary compensation" is not an express provision for the award of costs to complainants under the *Code*. The rule of liberal interpretation to carry out the objects of the *Code* to, as far as possible, remedy the effects of and prevent discrimination do not apply to procedural matters or the question of costs. Under the principle of statutory interpretation, *expressio unius exclusio alterius*, by expressly providing boards of inquiry with the authority to award costs only in

section 40(6) [now s.41] of the *Code*, the legislature has excluded jurisdiction to award costs otherwise under the *Code*.

In recent years, the restrictive scope for awards of costs in human rights proceedings has increasingly been challenged by litigants before the Board of Inquiry. Complainants and respondents, whether individuals or large corporations, can incur substantial legal costs in human rights proceedings, and they have begun to argue their claims to these expenses more and more frequently. Without access to awards for costs, many parties may be practically barred from asserting their rights or defending themselves against allegations made under the legislation.

A bright-line distinction between "substance" and "procedure" is potentially problematic. What good is it for human rights litigants to be granted a fair, large, liberal and purposive construction of their rights under the *Code* if such interpretative perspectives are denied as to the very process by which they can litigate these issues? Professor Gorsky made a similar point in *Wellington, (supra)*, where he stated at p.71: "I cannot see why the fact that s.41(4) is procedural in nature should interfere with examining the purpose of the enactment when the facts support such an approach."

The courts might be asked to revisit their initial interpretation of the legislation in view of the increasing tendency of complainants to retain independent counsel in human rights proceedings, the growing complexity and length of human rights hearings, and the escalating fees within the legal profession at large. Should the courts reconfirm their initial ruling on the restrictiveness of access to costs, the legislature should be asked to consider the feasibility of statutory amendments. At this point, however, this tribunal is bound by the ruling in *Karumanchiri*.

II. Costs Sought Earlier by the Complainant

At an earlier stage in this proceeding, the Complainant requested that he be reimbursed for the extensive legal costs he incurred in his representation before the Board. Had I not been bound by the Divisional Court ruling in *Karumanchiri*, I would have exercised my discretion to make an award for costs, assessing a portion of Mr. Naraine's legal expenses against the Commission and a portion against the corporate Respondent. Given the current state of the law, I was forced to dismiss the application. Now the Respondents have made an application for costs as well.

III. Costs Sought by the Corporate Respondent

The corporate Respondent, Ford Motor Company, noted that portions of Mr. Naraine's complaint were dismissed by the Board of Inquiry. Mr. Naraine's claims of discriminatory job training and job assignment were rejected due to the insufficient documentary and personal testimony available. As noted in earlier decisions, had a hearing been held shortly after Mr. Naraine's complaints were submitted in 1985, full consideration of these allegations might have been possible. However, as indicated in the Board's earlier Decision No. 96-023 dated 25 July 1996, the Commission's handling of its investigation of this case was appalling. It failed to compile the necessary documentary evidence, and it failed to move the case forward to a hearing where individuals knowledgeable about these matters could have testified from current recollection. As a consequence, the Respondent was able to demonstrate evidence of sufficient prejudice to warrant dismissing the claims concerning job training and job assignment.

In light of this record, Ford has sought an award of costs against the Commission for legal expenses associated with mounting a defence against the allegations of discriminatory job training

and assignment. The Commission takes the position that there was no entitlement to costs under s.41(4) because the complaint was not "dismissed." Counsel for the Commission asserted that to constitute a "dismissal of the complaint," the Board would have to hold that no right of the complainant had been infringed. Since this Board had found the corporate Respondent liable for several violations of the *Code* concerning Mr. Naraine's right to be free from racial harassment and discriminatory termination, the statutory precondition had not been met. Counsel for the corporate Respondent argued that the dismissal of even a portion of the complaint should suffice to meet the statutory requirements. Respondent's counsel advised that it was possible to separate out the portion of legal costs incurred in defending against the dismissed allegations, and he sought reimbursement for these specific expenses.

The wording of s.41(4) is not, on its face, particularly instructive on this question. The phrase "upon dismissing a complaint" might be construed to mean the "entire complaint" or "a portion of a complaint." Further assistance can be drawn from reviewing the whole subsection, which appears to have set forth very restrictive rules regarding costs. Costs can only be awarded against the Commission. Awards can only be ordered in favour of respondents. The Board is empowered to exercise its discretion only in limited and circumscribed situations. The very restrictiveness of the subsection as a whole would suggest that the legislature intended such awards of costs to be anomalous and unusual events. In keeping with the tenor of the rest of the subsection, it seems proper to conclude that the entirety of the complaint (or complaints in cases where multiple complaints are filed) must be dismissed before an award of costs is permissible.

In so holding, I am cognizant of the emerging debate between different adjudicators concerning the interpretation of s.41(4) of the *Code*. Some adjudicators have concluded that awards

of costs should be made only in extremely rare and egregious cases. Professor Gorsky expressed his concern in *Wellington* (*supra*) at p.77, about placing too heavy a burden on the Commission, its investigating staff and its counsel. Reading section s.41(4) in a purposive manner, he concluded that it was enacted "to provide a basis for awarding costs to a respondent where **certain special circumstances** exist." (emphasis added.) He intimated that an expansive interpretation of s.41(4) might place "an unnecessary chill on the Commission in pursuing complaints before a Board of Inquiry to vindicate possible breaches of complainants' rights under the *Code*."

In contrast, Professor Hubbard took a very different approach in *Grace & Belford* v. *149468 Canada Inc.*(*Mercedes Homes*) (unreported decision, 31 January 1996, Ont. Bd. Inq.). Instead of characterizing an award of costs as "exceptional," Professor Hubbard suggested that the question would be better framed as: "Why the Board **should not** exercise its discretion?" Professor Hubbard noted that the public absorbs the costs of litigation on behalf of the complaint. He then asserted that the complainant faced "no risk as to costs" in human rights litigation, even where he or she carried forward a bad faith complaint that was ultimately dismissed. Professor Hubbard concluded that the public, through the **persona** of the Commission, ought to pay the costs of innocent respondents victimized in such a process. To the extent that the Commission was embarrassed, or its internal budgetary arrangements disrupted by having to pay costs, Professor Hubbard suggested that it would be encouraged to scrutinize complaints more closely.

In my view, Professor Gorsky's approach is the more compelling. In times of growing concern over governmental expenditures, the Commission will already of necessity be screening its case load with the utmost of care to determine which complaints most merit litigation. The chilling effect that an expansive interpretation of s.41(4) would create might winnow out some of the most

important human rights disputes from ever reaching public adjudication. Given that the Supreme Court of Canada ruling in *Board of Governors of Seneca College* v. *Bhaduria* denies human rights complainants access to the civil courts, this would be a punitive interpretation of the legislation indeed.

Furthermore, Professor Hubbard is incorrect to suggest that the only party who incurs private legal costs in human rights proceedings is the respondent. As this case proves, many complainants are spending thousands of dollars to retain private counsel to press their cases during Board of Inquiry litigation. Some complainants would never manage to get their cases brought before the Board of Inquiry without such private representation. The current restrictive wording of s.41(4) does not permit complainants any prospect of redress concerning their legal costs, even where respondents put them to undue hardship, and bring forth responses that are vexatious, frivolous and trivial. In addition, the Commission too is denied redress for costs in cases where respondents insist upon full-scale adjudication despite knowing that their case is without a shred of legitimacy. Professor Hubbard is wrong in assuming that it is only the respondents who have honest claims to awards of costs.

I have ruled that the corporate Respondent is not entitled to an award of costs because Mr. Naraine's complaint was not dismissed in its entirety. If I am wrong in such an interpretation, it is still my opinion that costs are not warranted in this case. Even if I had found that the case was "dismissed," I would still have had to hold that the complaint was "trivial, frivolous, vexatious or made in bad faith," or that "undue hardship" was caused to the corporate Respondent. It was impossible to assess the validity of the allegations concerning job training and assignment because the Commission bungled its investigation and let the evidence get so stale that there was no fair

mechanism for adjudication. There is no way to ascertain now whether these portions of the complaint were "trivial" or "frivolous." And to the extent that the Commission may have behaved in a vexatious or bad faith manner, or caused "undue hardship" to the corporate Respondent, it also most certainly did the same to Mr. Naraine. Blocked from asserting his rights through civil litigation, Mr. Naraine was completely forestalled by the Commission from protecting his rights against discriminatory job training and assignment. He, too, experienced legal costs in trying unsuccessfully to prove these claims of discrimination.

Given the lopsidedness of the statutory limitations on s.41(4), it would seem completely unjust to exercise any discretion to award costs to the corporate Respondent on this portion of the claim. Assuming that the Commission's process was "vexatious" and instrumental in causing "undue hardship," it was not the corporate Respondent alone who bore the brunt of the damage. It would be anomalous to issue an order for costs to one side in this protracted dispute when another party was equally deserving of recompense. Indeed, such an unbalanced exercise of discretion would bring the human rights system of adjudication into grave disrepute. The fair decision-maker would have to reject the corporate Respondent's claim in such circumstances.

IV. Costs Sought by the Individual Respondents

Six supervisors and employees from Ford were named as individual Respondents in the complaints. At the outset of the hearing on the merits, counsel for the individual Respondents sought clarification from the Commission as to why they had been singled out. No response was forthcoming. In final legal argument, the Commission made no submissions concerning the liability

of the named individuals. At the conclusion of the hearing on the merits, this Board made no findings of liability against the individual Respondents, stating:

> The complaint originally named a number of individual Ford supervisors and employees as Respondents, along with the Ford Motor Company. The Commission never clarified why these individuals had been specifically designated, as opposed to the many other supervisors and employees whose actions also became the subject of testimony during the lengthy hearing. In any event, given the systemic nature of the racial discrimination, I do not think that this is an appropriate case for any findings of personal liability.

It is true that the complaints against the individual Respondents were dismissed. However, the decision to dismiss the complaints against the named individuals had less to do with their personal "exoneration" and far more to do with the pervasive and systemic nature of the discriminatory environment throughout the Respondent's workplace. When discrimination is as widespread as it was proven to be in this case, it becomes a very slippery exercise to try to draw bright lines between one group of actors who behaved contrary to the *Code* and another group who did not. In such circumstances, the Commission might be wiser to think twice about naming individual employees or managers as respondents. The Commission also ought to take care, should it choose to name individual respondents, to clarify for the individuals concerned and for the Board of Inquiry why particular persons were selected as parties. This reasoning, however, does not suggest that the named individuals in this case deserve reimbursement of their legal costs under the restrictive stipulations found in s.41(4).

There is no evidence to suggest that the allegations against the individual Respondents were trivial, frivolous, vexatious, or made in bad faith. Nor was it proved that defending themselves against the allegations caused the individual Respondents "undue hardship." Several of the named individuals did testify before the hearing, and some described the stress they experienced as named

parties. Counsel for the individual Respondents noted that costs had been incurred in calling witnesses and tendering evidence to meet the allegations. However, such experience appears to be generally inherent in adversary litigation. As noted in *Shreve* v. *Corporation of the City of Windsor* (unreported decision, 25 May 1993, Ont. Bd. Inq.), something out of the ordinary must arise before a Board can find "undue hardship." Professor Kerr indicated that all respondents will bear the burden of preparing a defence to a complaint, experience some legal costs, and suffer some stress and impairment of reputation. Something well beyond the routine must arise before classifying such outcomes as "undue hardship." The fact that this dispute was extraordinarily protracted does not, of itself, constitute "undue hardship." None of the individual Respondents attended throughout hearing. And none of them will bear their legal costs personally, since the corporate Respondent has agreed to reimburse them for legal expenses incurred during the process. Based on the requirements set out in s.41(4), the individual Respondents are not entitled to an award of costs.

V. Conclusion

The application for costs on behalf of the corporate Respondent and the individual Respondents is denied. This is not a case which meets the statutory requirements under s.41(4) of the *Code*, nor is it a case in which a Board should be inclined to exercise its discretion to award costs.

March 11, 1997
Date

Constance Backhouse
Chair, Board of Inquiry